

Cato Handbook *for* Policymakers

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22. Restoring the Right to Keep and Bear Arms

Congress should

- compel Washington, D.C., to abide by the principles established in the *Heller* decision;
- repeal the federal ban on interstate purchases of handguns;
- revoke the federal age minimums on buyers and possessors of handguns and long guns;
- amend federal law to allow firearm purchases by users of controlled substances, particularly in states that have legalized medical or recreational marijuana;
- resist onerous and ineffective proposals for universal background checks on firearms sales and loans;
- modernize and improve the operations at the Bureau of Alcohol, Tobacco, Firearms and Explosives and revoke the executive branch's authority to use the Arms Export Control Act to impose gun control;
- restore funding to process "relief from disability" applications to own firearms; and
- ensure that secret government lists—such as the "no-fly" list—are not used to unconstitutionally deprive citizens of their Second Amendment rights.

It has been almost 10 years since the Supreme Court decided *District of Columbia v. Heller*, which affirmed that the Second Amendment secures an individual right to keep and bear arms. Two years later, in *McDonald v. Chicago*, the Court incorporated that right to the states, ensuring that the Second Amendment now protects citizens from onerous firearm regulations passed by federal, state, or municipal governments.

Many people predicted that, after *Heller* and *McDonald*, the Court would soon hear more Second Amendment cases to clarify what sort of firearm regulations violate the right to keep and bear arms. For example, can states prohibit carrying weapons, or do magazine size restrictions violate the Second Amendment? Yet, although some lower federal courts have opined on these and other questions, the Supreme Court has stubbornly resisted hearing more Second Amendment cases.

Nevertheless, within the *Heller* framework, Congress now has a historic opportunity to begin restoring Americans' right to keep and bear arms. To be sure, Cato Institute scholars have opposed previous congressional meddling in the gun control arena on the ground that most federal regulations of firearms are not authorized under the Interstate Commerce Clause. That clause was intended to ensure the free flow of trade across state lines, not to sanction a federal police power. Regrettably, the battle to limit the interstate commerce power to interstate commerce seems to have been lost in the courts, which have expanded the scope of the Commerce Clause to cover regulation of nearly anything and everything. But there can be no constitutional objection to repealing laws—or, at a minimum, amending their most egregious provisions—that had no constitutional pedigree in the first place. The same logic applies, of course, to laws that offend the Second Amendment.

Indeed, even if a federal gun law were constitutionally authorized, that does not mean it would be constitutionally mandated. Accordingly, included in what we propose below are recommendations to repeal or amend statutes that are misguided on public policy grounds and that may also be infringements of the Second Amendment.

Compel Washington, D.C., to Abide by the Principles Established in the Heller Decision

Few jurisdictions in the United States worked as doggedly to disarm citizens as did the District of Columbia, our nation's capital and, in the 1990s, the "murder capital." Until the *Heller* decision, no handgun could be registered in D.C. Even those handguns grandfathered in before the District's 1976 ban could not be carried from room to room in the home without a license, which was never granted. In addition, all firearms in the home, including rifles and shotguns, had to remain unloaded and either disassembled or bound by a trigger lock. In effect, no one in the District could possess a functional firearm in his or her own residence. And the law applied not just to "unfit" people like felons or the mentally

incompetent, but across the board to ordinary, honest, responsible citizens. Happily, the Supreme Court ruled that all those provisions violate the personal and private right to keep and bear arms that is secured by the Second Amendment.

Today, D.C. still has some of the most stringent gun laws in the country. All firearms must be registered, and those seeking a permit must be at least age 21 (for a handgun) and pass an online training course and a background check. There is also a 10-round magazine limit, which is constitutionally dubious. Pistols and rifles that come with standard magazines that hold more than 10 rounds are commonly used for lawful self-defense and sport, including the popular Beretta Model 92 pistol (standard 16-round magazine) and the AR-15 rifle (standard 20-round magazine). Aside from the doubtful contributions to public safety—very few, if any, acts of violence depend upon having more than 10 rounds in a magazine—the “common use” test articulated in *Heller* casts doubt on the constitutionality of laws prohibiting these weapons.

As of this writing, the U.S. District Court for the District of Columbia ruled unconstitutional the “good cause” provision of D.C.’s carry permit system, which requires those seeking a permit to carry a gun to show a “good reason to fear injury to his or her person or property.” The government asked for and received a stay from the U.S. Court of Appeals for the D.C. Circuit, essentially reinstating the good cause provision until the D.C. Circuit can hear the appeal.

Yet Congress does not need to wait for the judicial process to work itself out. Under Article I, Section 8 of the Constitution, Congress can and should exercise its plenary power over all legislative matters in the nation’s capital and compel the city to abide by the principles established in the *Heller* decision. Home rule, arising out of authority delegated by Congress to the D.C. government, is not a license to violate the Constitution.

For starters, Congress should enact legislation to alter how D.C. processes gun registrations. A streamlined registration process would be based on the congressionally created National Instant Criminal Background Check System, which is mandatory for all retail firearm sales in the United States. The system uses computerized databases to complete a background check within a few hours in most cases.

Congress should also repeal D.C.’s magazine restriction, remove the discretionary “good cause” requirement for a carry permit to convert the District into a “shall issue” jurisdiction for permits, and relax the constraints

on starting and maintaining gun stores. Currently, it is nearly impossible to open a gun store in D.C., and there is only one licensed dealer in the city. The dealer, who operates by appointment only in an office in police headquarters, doesn't even sell guns—he merely acts as a middleman for those who want to transfer guns to the District and charges \$125 for his service. A gun store and range is set to open in the District by 2017, but the process has been arduous and the proposed store will still face unreasonable restrictions. Gun stores can operate only in “C-2” zoned areas, and they cannot be within 300 feet of “(1) a residence or Special Purpose District; or (2) a church or other place of worship, public or private school, public library or playground,” which leaves very few available spaces.

There have been beneficial changes since 2008, some through legislation and some through court victories. But the D.C. government is still hostile to its citizens exercising their Second Amendment rights. Congress can and should fix this.

Repeal the Federal Ban on Interstate Purchases of Handguns

Under federal law, a person who is not a licensed dealer—that is, a Federal Firearms Licensee (FFL)—may acquire a handgun only within the person's own state. The acquirer may, however, purchase the handgun from an out-of-state FFL, providing an arrangement is made for the handgun to be shipped to an FFL in the purchaser's state of residence, where the purchaser can then obtain the handgun after complying with all necessary background checks. That rule does not apply to rifles and shotguns. A buyer may acquire a rifle or shotgun, in person, at a licensee's premises in any state, provided the sale complies with laws applicable in both the state of sale and the state where the purchaser resides. So a person who resides in New Mexico can buy a shotgun from a licensed firearms dealer in South Dakota (who must, by federal law, get prior approval for the sale from the National Instant Criminal Background Check System). The New Mexican can then bring the gun home to New Mexico, in compliance with New Mexico law.

There is no persuasive reason why the framework applicable to rifles and shotguns should not be equally applicable to handguns. No relevant state laws would be violated, and all background checks would be completed. In short, Congress should repeal the federal restrictions on interstate handgun sales.

The unique situation in Washington, D.C., compels timely action. Because of the District's 1976 ban, there are currently no stores within the city where a handgun can be obtained, and there is only one FFL willing to take delivery from out-of-city parties, on a limited basis. Thus, it is incredibly difficult for someone who lives in D.C. to acquire a handgun either inside or outside the city. Residents of the city who do not own a handgun are seriously impaired from exercising the right, guaranteed by the Constitution and affirmed by the Supreme Court, to defend themselves within their homes.

In February 2015, the U.S. District Court for the Northern District of Texas struck down the interstate purchase ban as violating the Second and Fifth Amendments (because, by discriminating on the basis of residency, the law has been held to violate the equal protection component of the Due Process Clause). The plaintiffs in the case are a Texas FFL and a couple who live in D.C. The government appealed the decision to the Fifth Circuit, where a decision is still pending.

Revoke the Federal Age Minimums on Buyers and Possessors of Handguns

Under current federal law, the minimum age at which prospective buyers can acquire a handgun from an FFL is 21. The minimum age at which anyone can possess a handgun, or purchase a rifle or shotgun from an FFL, is 18. Those restrictions should be repealed. That is not to say there should be no minimum purchase age. But, assuming that bans on the sale of a handgun to a 20-year-old, or possession of a handgun by a 17-year-old, could survive Second Amendment scrutiny, then state, not federal, law should address that topic. Similarly, states have varying minimum ages for the purchase of tobacco, but a federal minimum would be inappropriate.

Although the federal statute includes some exceptions—for example, a parent may take a child target shooting—it nonetheless usurps traditional state powers, is overbroad, and encroaches on parental rights. Even if a child is under direct and continuous parental supervision, the parent commits a federal crime unless he or she writes a note giving the child permission to target shoot and the child always carries the note. Congress should abolish federal age limits, leaving the states to set their own policies—with due regard to a paucity of empirical evidence that federal age limits have reduced gun accidents or criminal violence.

Amend Federal Law to Allow Firearm Purchases by Users of Controlled Substances, Particularly in States That Have Legalized Medical or Recreational Marijuana

Federal law, under 18 U.S.C. §922(d), currently lists a wide variety of people who are prohibited from purchasing a firearm. Many of these are sensible (felons, fugitives from justice), but many are not. Of particular concern are prohibitions affecting people who are not inherently violent or dangerous. As the Supreme Court held in *Heller*, the right to keep and bear arms is fundamental, and Congress should be wary of taking away that right from entire classes of nonviolent people.

As of November 2016, adults can now legally purchase and consume marijuana in eight states. Nevertheless, federal law still classifies marijuana as a Schedule 1 drug, thus making marijuana simultaneously legal and illegal in states that have already legalized it or will do so in the future. That puts marijuana users in those states in a difficult spot when it comes to purchasing a gun. The federal form they must fill out asks whether they are a user of marijuana. If they say “yes,” they will not be able to purchase a gun; if they lie and say “no,” they will be committing a felony punishable by up to five years in prison.

Medical marijuana users are also prohibited from purchasing a gun. Twenty-eight states and the District of Columbia now allow medicinal use of marijuana by authorized persons. Becoming an authorized medicinal user often includes registering with a state database or permitting system. That makes the act of lying on the federal form when purchasing a gun even more hazardous.

At the very least, Congress should remove from the list of prohibited persons marijuana users in those states that have legalized either medicinal or recreational use. Yet controlled substance users of all types should not have their Second Amendment rights taken from them. Drug users with no history of violent crime still have a right to self-defense. State laws can appropriately address the issue, as they do with alcohol; for example, a person’s demonstration of dangerous lack of self-control when under the influence (e.g., multiple drunk driving convictions) can lead to revocation of a handgun carry permit.

Resist Onerous and Ineffective Proposals for Universal Background Checks on Firearms Sales and Loans

In recent years, calls for “universal background checks” on all firearms purchases have received a lot of attention. Various bills have been intro-

duced, but none has yet been able to pass. Congress should be aware that expanding background checks is unlikely to affect the gun-violence rate, and many bills requiring universal background checks suffer from severe problems that could turn nearly every gun owner into a felon.

Federal law currently requires all firearms dealers to be FFLs and, among other things, requires a background check on every buyer to whom they sell a firearm. Yet no background check is required when a sale occurs between two private individuals. In other words, you can sell your neighbor your hunting rifle without doing a background check on your neighbor.

There is some dispute about how many guns are transferred via this so-called private sale loophole. President Barack Obama and other gun-control advocates have consistently and irresponsibly claimed that the number is 40 percent. That claim, which relies on data that is two decades old and predates the inauguration of our current background check system, was given “three Pinocchios” by the fact checkers at the *Washington Post*. Other, more accurate studies have found nonbackground-check purchases to be around 20 percent of gun sales—and many of those are gifts between family members.

Surveys of criminals have long indicated that their guns are rarely obtained through legal avenues. Instead, the black market is the overwhelming source for guns used in crimes. That makes sense: criminals are unlikely to submit to a background check process, which they are likely to fail. Therefore, most criminals acquire guns in unlawful ways. Most important, if new laws are enacted that prohibit certain types of sales without background checks, criminals will adjust and find new methods for obtaining guns.

Nevertheless, it is also overreaching to say that background checks will never help keep guns away from any criminal. There will always be marginal criminals who are weakly motivated to acquire a gun. But the effectiveness of expanding background checks depends upon a truly rare combination of conditions: (1) a law-abiding seller who does not wish to sell to a criminal; (2) a seller who fears getting caught if he doesn’t perform the required background check; (3) a buyer who is prohibited from acquiring a gun; (4) a buyer who is willing to submit accurate information about himself to a background check; and (5) a buyer who cannot acquire the gun elsewhere. Such a confluence of conditions might occasionally exist, but any rare benefit would be outweighed by false positives, which deny legitimate purchasers their Second Amendment rights.

Further, Greg Ridgeway, acting director of the National Institute of Justice, acknowledged in a 2013 memorandum that requiring background

checks for gun sales by non-FFLs would be unenforceable without universal gun registration. Such a gun registry would be contrary to the Firearm Owners' Protection Act and other provisions of federal law. The prohibitions on federal gun registration exist because Congress recognized that registration sets the stage for confiscation. For example, New York City's registration is currently being used to confiscate rifles and shotguns that hold more than five rounds of ammunition.

Universal background check proposals at the federal and state level are Trojan horses that criminalize ordinary activities having nothing to do with firearms sales. At minimum, any proposed federal bill should be heavily scrutinized to ensure that it doesn't produce the absurd consequences of state universal background check laws.

In Washington State—which has enacted one version—the normal, everyday practices of gun owners, safety instructors, hunters, and even museums have been turned into felonies. Even harmless firearms transfers, such as giving a rifle to a friend at a backyard shooting range, are prohibited without first processing the transfer through an FFL. That is because the state of Washington defines a “transfer” as “the intended delivery of a firearm to another person without consideration of payment or promise of payment including, but not limited to, gifts and loans.” The Washington law applies not only to permanent but also to temporary and even momentary transfers.

Or imagine that the owner of a farm has invited a friend over for some target shooting on the man's farm. He wishes to lend a rifle to his friend for the afternoon. Under Washington's universal background check law, the owner and the friend must first travel to a gun store. There, the FFL will process the loan as if he is selling a firearm out of his own inventory. Thus, state universal background check laws can require lenders to fill out federal paperwork consisting of dozens of questions (including offensive and irrelevant ones, such as the friend's race and whether the friend is Hispanic). A knowingly false answer is a federal crime punishable by up to five years in prison. Filling out the form in a manner not approved by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) (such as writing one's state of residence as “Wash.” rather than “WA”) will get the store in trouble with the ATF. So store clerks understandably spend a lot of time making sure that customers fill out the paperwork correctly. Of course the store charges a fee for the service, since all the time spent processing the loan is time not spent selling the store's own firearms. On top of the store's fee, the state government may collect its own fee for conducting the background check.

Even worse, a few hours later, after the farmer and his friend are finished with an afternoon of target shooting, they must return to the gun store. The whole process must be repeated, with a new round of paperwork and fees. This time, the store will process the return of the loaned gun to its owner as if the owner were buying a new gun from the store's inventory. Imposing this process on firearms loans is pointless and bureaucratic. It also makes firearms loans impossible except during hours when there is a nearby gun store that is open and is willing to process the transaction. Many stores refuse to do so, since they want their employees to spend time on selling their own inventory, rather than on risking liability for paperwork errors involving other people's guns.

The extreme burdens on firearms loans can be deadly. Universal background check laws make it impossible for a person to lend a firearm to a woman who is being threatened by an ex-boyfriend, if the threat arises on a Saturday night, when gun stores are closed. (Most background check proposals only allow defensive firearms loans when the threat is "immediate"—and not for cases when a stalker might attack in an hour, or next week, or the next month.)

The absurdly overbroad controls on loans criminalize most gun owners for innocent activity. They are particularly problematic for gun safety instructors, who pass guns back and forth between themselves and students while teaching safety courses; for people in rural areas who may live hours away from any gun store; and even for museums that may wish to display guns but cannot obtain, move, or clean them without submitting to a background check. Colorado amended its universal background check law to exempt all temporary transfers of less than 72 hours. That made the law more sensible but did not solve all the problems. Someone who wishes to store his gun at his cousin's house while he spends two years in the Peace Corps, for example, would need a background check on his cousin and then another on himself when the gun is returned.

Some think that people would never be prosecuted for these minor infractions, even if they are "technically" illegal. But relying on the restraint of federal prosecutors is never a good idea. Gun owners are constantly prosecuted for similar, or even smaller, transgressions. In one example, in 2002, John Mooney seized a firearm from his ex-wife when she, while intoxicated, pointed it at his head. He then walked seven blocks to the bar where he worked to hand the weapon over to the police. Because Mooney was a convicted felon, however, he was charged with the unlawful possession of a firearm.

Even if a universal background check law were a good idea, *it should apply only to sales and permanent dispositions*; loans and returns should be exempted. And every effort should be made to reduce the burden on gun buyers—including fees, paperwork, and trips to gun stores.

Furthermore, law enforcement officers and those who already hold concealed carry permits issued by their state should not have to undergo additional background checks when they purchase a gun from a private seller. Nor should it be criminal for law enforcement officers to return stolen guns to crime victims or for campus police offices to store hunting guns owned by students. Concealed carry permit holders typically have submitted to biometric identity verification, background checks, and safety training. Making them go to a gun store for a lower-quality background check when they borrow a gun, or buy one from a friend, is duplicative and unnecessary.

There are many ways to accomplish background checks without requiring that a seller and a buyer find a gun store to carry one out. Private citizens should be able to accomplish any required background check by contacting the appropriate state agency through the phone or the Internet. Any universal background checks bill that really aims for background checks on gun sales—rather than the mass criminalization of innocent gun owners—will contain all of the above exceptions. And, finally, it should be noted that proposals for universal background checks distract Congress from the more meaningful debate about policy changes that could significantly lower gun violence, such as ending the drug war.

Modernize and Improve ATF Operations and Revoke the Executive Branch's Authority to Use the Arms Export Control Act to Impose Gun Control

Abusive practices by the Bureau of Alcohol, Tobacco, Firearms and Explosives led Congress to enact the Firearms Owners' Protection Act in 1986. Yet much more needs to be done. For example, when the ATF imposes a penalty on a gun store, the store should be able to appeal the case to a neutral administrative law judge. Currently, an employee of the ATF itself hears appeals of ATF penalties.

Appropriations riders have prevented the ATF from using gun dealer records to compile a computerized national registration database of gun owners. That prohibition should be part of a permanent statute. Federal law already prohibits the creation of a national gun registry, but the ATF has claimed that a computerized database of every sale ever conducted by

every retired FFL is not a national gun registry. Other appropriations riders protect citizen privacy by preventing the ATF from disclosing gun-tracing data (e.g., the name and address of a person whose gun is stolen) to the general public. The data can still be disclosed in connection with a bona fide law enforcement investigation. Those disclosure rules should be permanently codified as well.

The ATF's firearms-testing facility has long been a subject of concern. ATF employees who conduct tests on firearms are not required to have expertise in forensics or other procedures appropriate to a crime laboratory. To support prosecutions for machine-gun possession, ATF testers have been known to use one ammunition type after another until they find one that occasionally makes the firearm malfunction by producing two shots from a single trigger pull. A jury will then see an official ATF report declaring that the gun is a machine gun. Congress should require that all ATF firearms testing be filmed and the films be preserved.

Federal law has long required licenses for persons who commercially manufacture firearms and for persons who engage in the business of gunsmithing. The licenses are issued by the ATF. In July 2016, the Obama administration issued "guidance" requiring many gunsmiths to obtain a separate license, costing \$2,500, from the Department of State, Directorate of Defense Trade Controls. Supposedly, these licenses are necessary for compliance with the Arms Export Control Act, but the administration is requiring them from people who never export anything. Under the new directive, the one-time performance of simple activities such as adding a two-round magazine extender to a five-round shotgun, or drilling a sight mount on a handgun to improve its accuracy, constitute "manufacturing" and thus require the \$2,500 Arms Export Control Act license. Many of the supposed "manufacturing" activities are often performed by ordinary gun owners to improve their own firearms. Congress should revoke the executive branch's supposed authority to impose domestic gun control in the guise of regulations or guidance under the Arms Export Control Act.

Restore Funding to Process "Relief from Disability" Applications to Own Firearms

The federal prohibitions on firearms possession are extremely broad and ex post facto. The Gun Control Act of 1968 banned gun possession by anyone convicted of a felony or dishonorably discharged from the military. Thus, a person who pleaded guilty to a tax offense in 1959, or who was dishonorably discharged in 1965 because of homosexual

orientation, is barred for life from possessing a gun. The 1994 ban on gun possession by someone guilty of a domestic violence misdemeanor is also *ex post facto*—applying to people who might have pleaded guilty decades earlier, even if they had done nothing wrong but could not afford a lawyer and found it simpler to resolve the case for a \$50 fine.

To provide a safety valve for the expansive bans, the Gun Control Act allows “relief from disability.” People who can prove they have a long record of law-abiding behavior and good conduct can petition ATF for restoration of their Second Amendment rights. Granting a petition is entirely at the discretion of the ATF. Since 1992, appropriations riders have forbidden ATF from processing petitions for restoration of rights. Those riders should end, and ATF should be directed to set up a process in which such petitions are funded by a fee charged to the petitioner.

Federal law also bans gun possession by people subject to temporary restraining orders. The law should be clarified so that it applies only to cases where a judge has made a particularized finding that a person has threatened, or constitutes a threat to, another person. Routine orders directing one or both parties in a divorce to stay away from and not harm each other should not be the basis for deprivation of a constitutional right. The change can be effectuated by changing the word “or” to “and” in 18 U.S. Code § 922(d)(8)(B)(i) and in (g)(8)(C)(i).

Ensure that Secret Government Lists—Such as the No-Fly List—Are Not Used to Unconstitutionally Deprive Citizens of their Second Amendment Rights

Recently, many have called for the federal government to prohibit those on the no-fly list from purchasing firearms. Not only should this be resisted, it should be seen as setting a dangerous precedent for the government stripping citizens of constitutionally enumerated rights by secretly placing them on government-maintained lists.

The no-fly list has been called a “Kafkaesque bureaucracy” by the American Civil Liberties Union. The list is secretive, unaccountable, and discriminatory. Someone can be listed based on suspicion or hunch; according to the government’s guidelines for adding people to the list, “irrefutable evidence or concrete facts are not necessary.” In 2014, a federal district court ruled that dooming an individual to indefinite placement on the list violates due process.

According to the Associated Press, more than 1.5 million names have been added to the list, and subsequent reporting found that half of those

were marked as having “no recognized terrorist group association.” The Council of American-Islamic Relations has filed a class action lawsuit alleging that the list is discriminatory against Muslims.

During the Bush administration, Rep. Sheila Jackson-Lee (D-TX) chaired a hearing on the terror watch list and worried that it would catch people who “innocently come to use the airlines and to visit Grandma, to go on a family vacation, to try to make deadlines to a funeral, and whatever else the airlines are used for.” Rep. Yvette Clarke (D-NY) has said that “with so many different names on the list, it is not surprising that every single day countless Americans are misidentified as terrorists.” Despite these reservations, both representatives participated in the June 2016 “sit-in” on the floor of the House, partially in protest of the failure of “no-fly, no-buy” legislation.

On top of these concerns, a “no-fly, no-buy” law would have no effect on mass shootings or terrorist attacks. Even if they appeared on the list, and it is highly unlikely they would, terrorists and mass shooters are highly motivated criminals who are not deterred by being told “no” at a gun store because their name appears on a “no-buy” list. Such laws are political theater at its finest—scoring solid points on rhetoric while doing nothing to solve the problem—while setting a dangerous precedent for eliminating civil liberties through government-maintained secret lists.

Conclusion

The Second Amendment secures “the right of the people” by guaranteeing the right of each person. Over the years, our elected representatives have adopted a dangerously court-centric view of the Constitution: a view that decisions about constitutionality are properly left to the judiciary. But members of Congress also swear an oath to uphold the Constitution. Congress can make good on that oath by legislating to restore our right to keep and bear arms.

Suggested Readings

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